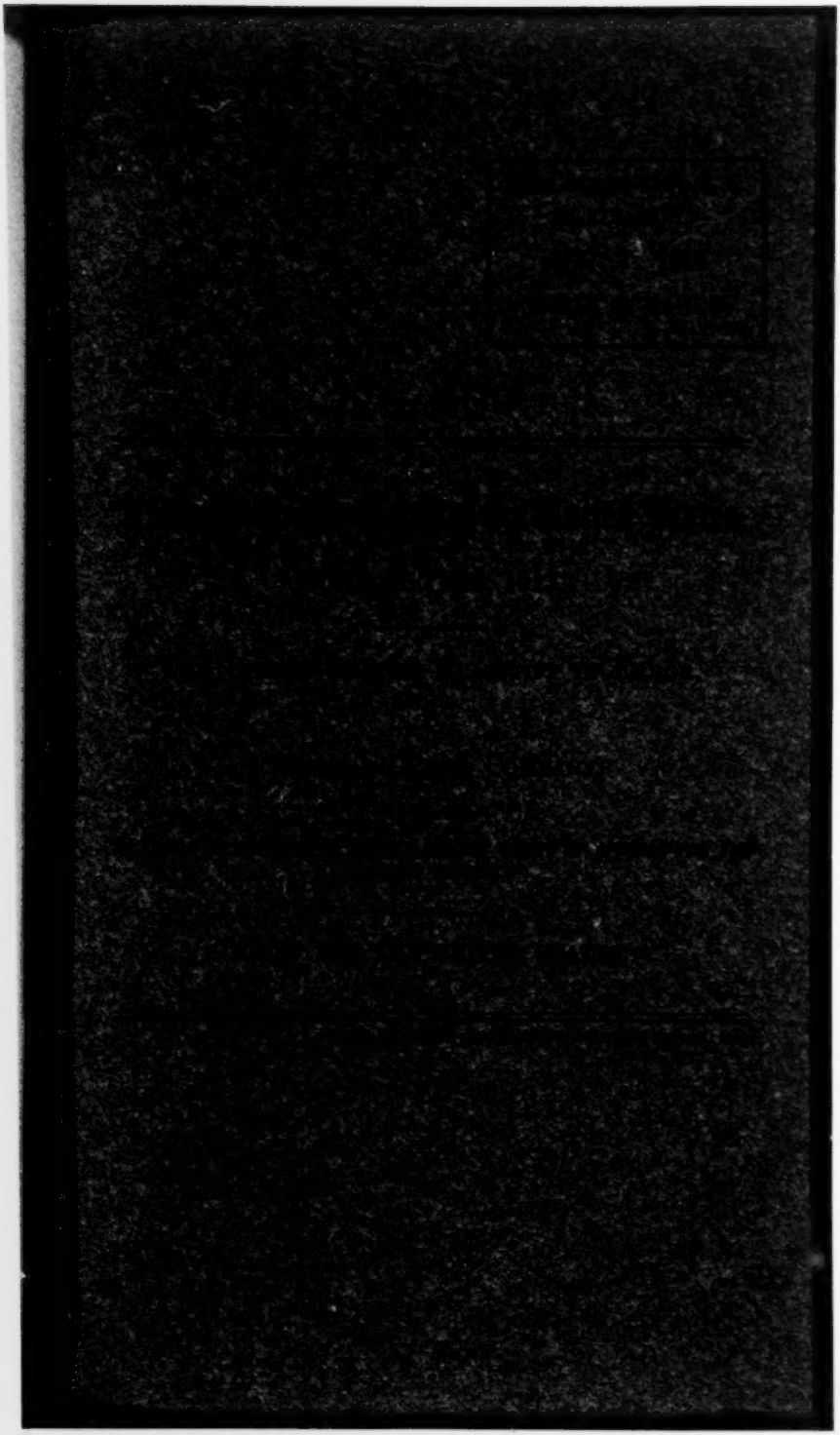

INDEX.

ALPHABETICAL LIST OF CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
BUFFALO PITTS COMPANY.
No. 369.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This action was instituted, under the Tucker Act, by the Buffalo Pitts Company, in the Circuit Court of the United States for the Western District of New York, against the United States to recover $1,320 for the use of a certain engine, under an alleged implied contract of the United States to pay therefor; the court filed an opinion (R. 14–20), setting forth the specific findings of the facts and conclusions of law, as required by said act, and rendered judgment thereon against the United States. The case was thereupon taken, by writ of error, to the Circuit Court of Appeals for the Second Circuit, and from

that court brought here by writ of error complaining of its judgment affirming that of the trial court.

The Government contends that the Buffalo Pitts Company had no such title or right to the engine as would enable it to contract for its use; that there was no evidence showing intention to make such contract, nor conduct of the parties from which same might be implied; that no Government agent having authority, by word or conduct, made or ratified any such contract; and that the conduct of the Government's agents relied on was not in recognition of but hostile to the title or right claimed by defendant in error, and at most only tortious, from which no contract binding upon the United States could be implied; that the Buffalo Pitts Company failed to prove its case as laid, and therefore can not recover in this action; and that the case, as proved, showed said courts had no jurisdiction.

STATEMENT OF FACTS.

The facts, as found by the trial court, pertinent to the questions herein discussed, are as follows (R., pp. 15–19):

The Buffalo Pitts Company, hereinafter called plaintiff, on May 20, 1905, sold and delivered to the Taylor-Moore Construction Company, hereinafter called the construction company, a certain traction engine for the price of $1,820, $220 thereof having been paid in cash and the balance of the purchase price, evidenced by certain promissory notes, payable in monthly installments thereafter, to secure

which deferred payments the said Construction Company executed a chattel mortgage upon said engine to plaintiff, the material terms of which provided that—

> if default should be made in payment as aforesaid, or if any attempt should be made to dispose of or injure said property or to remove said property from said County of Chaves or any part thereof, by said mortgagor or any other person, or if said mortgagor should not take proper care of said property, or if said mortgagee should at any time deem itself unsafe or insecure, then the whole amount unpaid should be considered immediately due and payable, and then, thereupon and thereafter it should be lawful for the said mortgagee to take said property and enter on the premises wherever the same be found, to take and remove the same and hold or sell and dispose of the same and all equity of redemption at public auction with notice as provided by law.

Said mortgage was duly filed for record on May 22, 1905, and no part of the money thereby secured was ever paid to said mortgagee, at all times the owner and holder of said mortgage. The engine, upon its delivery to the construction company, was put to work by it upon the so-called Hondo project, a part of the reclamation service undertaken by the Department of the Interior of the United States in New Mexico, which work was being prosecuted under a contract between the United States and the construction company. The construction company made

default in its contract with the United States on June 7, 1905, was suspended from work thereunder, and thereupon assigned to the United States all its interest in said contract. The United States, through W. M. Reed, district engineer of the Reclamation Service under the Department of the Interior, and the local representatives of the Government in charge of the work, on that day took possession of all material, supplies, and equipment belonging to the construction company, including the said engine, "pursuant to and under the provisions of said contract with the United States." (R., 17.)

On June 16, 1905, plaintiff made demand upon the United States, through said Reed, for possession of said engine, which demand was refused, and the engine retained and used until June 21, 1906. Thereafter the United States, through certain of its officers, ratified and adopted the acts of said Reed "in respect to the possession of said engine and appurtenances." (R., 18.) During the use of said engine plaintiff, on June 16, 1905, and on September 30, 1905, notified the United States of the execution and filing of said mortgage, and that it claimed said property "under the title thereby vested in it and claimed the right of possession because of the default of the mortgagor in the conditions thereof." (R., 18.) The United States "at all said times well knew of the existence and filing of said chattel mortgage and did not at any time dispute the validity thereof, and on September 30, 1905, represented to the plaintiff that the defendant was using and would continue to use said engine

in said work, and that any legal proceedings to recover the possession thereof would be resisted and defeated by the defendant, and further represented to the plaintiff that if said property were left in the defendant's possession its attorney would recommend payment by the defendant therefor." (R., 19.) "Plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant, and upon the representations made to it as aforesaid, and consented to defendant's retaining possession of said property in expectation of receiving due compensation therefor." (R., 19.)

The mortgagor has made no claim to the property since the suspension and assignment of said contract. The value of the engine at the time of the said demand and refusal was $1,674.60, and the value thereof when the defendant surrendered the said engine was $500.

SPECIFICATION OF ERRORS.

The assignments of error are found on pages 98 to 101, inclusive, of the record, only the substance of which need be here repeated. The contentions of the Government, as therein shown, are: That the Circuit Court of Appeals erred in refusing to reverse the judgment of the Circuit Court denying the motion of the Government to dismiss the case upon the grounds that plaintiff could not recover in this action, because at the time the Government took the engine plaintiff was not in possession nor entitled to possession thereof and had no right or authority to make any contract for its use; that plaintiff's proof

failed to establish any action of the Government or its agents from which a promise to pay could be implied, or that those with whom the alleged conversations and transactions occurred had any authority to bind the Government to any such contract; that the Circuit Court had no jurisdiction of this suit; and that as the taking of the engine by the Government was a lawful taking, no action to recover will lie against it; that the Court of Appeals erred in refusing to reverse the judgment of the Circuit Court for the errors committed by it in finding, as a matter of law, that the plaintiff was the lawful owner of the engine when it demanded possession thereof and entitled to its possession; that after the refusal by the Government of such demand for possession it was liable to plaintiff upon an implied contract to pay for the use thereof and estopped by the conduct of its officers from denying that it was the property of plaintiff; and that the Circuit Court of Appeals also erred in affirming the judgment of the Circuit Court, as modified by its decision, finding and deciding that the refusal of the United States to deliver possession of the engine to plaintiff when demanded raised an implied promise to pay for its use, and in finding and deciding that the Circuit Court was right, whether resting upon an implied contract or upon the obligation imposed upon the United States by the Fifth Amendment to the Constitution; and that the Circuit Court further erred in denying the Government's application for rehearing and its refusal to remand the case to the trial court for more specific

findings as to the actions taken by and relations existing between the respective parties.

ARGUMENT.

The Tucker Act (approved Mar. 3, 1887; 24 Stat. L., c. 359, p. 505), under which this action was brought, provides, in section 2 thereof:

> That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars.

The preceding section grants to the Court of Claims jurisdiction over:

> All claims founded * * * upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable.

Under the terms of the act, and also under the allegations of the petition and the contentions of plaintiff, there can be no recovery in this action unless the evidence discloses an implied contract on the part of the United States to pay for the use of the engine in

question, it not being contended that there was an express contract nor that the Government would be liable if the action was one sounding in tort.

To constitute an implied contract in this case there must have been a meeting of the minds of parties capable of and authorized to contract with respect to the subject matter under consideration. It will not suffice to show merely such tortious acts as would, between individuals, permit the injured party to waive the tort and sue upon an implied assumpsit.

> The United States can not be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract. (*Hill* v. *United States*, 149 U. S., 593, 598.)
>
> In order to give the Court of Claims jurisdiction under the act of March 3, 1887, the demand sued on must be founded on a *convention* between the parties—a *coming together of minds*—and contracts or obligations implied by law from torts do not meet this condition. (*Harley* v. *United States*, 198 U. S., 229. Headnote 1.) Italics ours.

It is therefore evident that unless plaintiff had such title to the property in question as would enable it to make a contract of the character claimed to have been impliedly made with the United States, or if the parties alleged to have represented the United States in such transactions were not authorized, or if

authorized, did not purport, by words or acts, to make such an agreement, no contract binding upon the United States can be implied.

I.

Plaintiff had no Such Title to the Engine as Would Enable it to Contract for its Use.

The title to the engine passed to the construction company upon the sale and delivery thereof to it. At the time plaintiff demanded the engine of the United States it had a lien or, at most, only a qualified title thereto, limited and defined by the terms of the mortgage. Such title was defeasible upon compliance with the terms of the mortgage and, in the event of default by the mortgagor, the mortgagee was only authorized to take the engine and "hold or sell and dispose of the same and all equity of redemption at public auction with notice as provided by law," retaining only sufficient of the proceeds to pay the balance due, and paying over any surplus to the mortgagor, and plaintiff had no right to use same or lease to another.

At the time the United States took possession of the engine, along with all other equipment used by the construction company upon the work, there had been no default in payment, nor had plaintiff elected to declare the mortgage due for insecurity or any other reason. The laws of New Mexico (R., 64) provide that when the contract did not otherwise stipulate the mortgagor should be entitled to possession. So that when the United States took possession of the engine

under their contract with the construction company, which antedated the date of the sale and mortgage, their possession was lawful and under a claim of right.

Whatever rights plaintiff may have had at the time of its demand for the engine, it, acting upon advice of counsel and for reasons of expediency, and not relying upon any promise of the United States or any of its agents to pay, did not choose to exercise them. Certainly it did not foreclose the mortgage and buy in the absolute title so that it might lease the engine to the United States. Therefore, having no title under foreclosure proceedings, nor right under the mortgage, to make such contract for the use of the engine, this court will not hold that it did indirectly, by means of an implied contract, what it could not directly contract to do.

II.

There Was no Intention to Make a Contract for the Use of Said Engine, nor Conduct of the Parties From Which Such Contract Might be Implied.

The evidence in this case and the findings of fact by the court below show that there was no mutual intent to contract for the *use* of the engine. Plaintiff neither expressly nor impliedly offered to lease the engine, but, not wanting it (R., 37), always made effort to *sell* same to the United States, and to collect therefor not the value of the use but the balance of the purchase price.

The finding of the court on this point was that it was "represented to the plaintiff that if said property were left in the defendant's possession its attor-

ney would *recommend* payment by the defendant therefor." (R., 19.) Evidence adduced on this subject was as follows:

> He (Mr. Reed) said that it would only be a few days until the Government would do something about it, either surrender the engine or pay our claim. And never questioned the right that we had to our pay of *deferred payment*. (R., 35.)

The other references to this subject are found on pages 35, 37, 39, 40, 46, 49, and 55 of the record.

Certainly, from plaintiff's futile efforts to sell, no contract could be implied to pay for the use of the engine and thereafter to return it to plaintiff, the United States all the while claiming the paramount title to such use. (R., 63.)

It is evident, therefore, that there was no meeting of the minds with respect to the alleged implied contract sued upon.

> Implied contracts in fact do not arise from the denials and contentions of parties, but from their common understanding in the ordinary course of business, whereby mutual intent to contract without formal words therefor is shown. (*Knapp* v. *United States*, 46 C. Cls., 601, 643.)

There was never any promise to pay for the engine or its use nor any acts from which any such promise might be implied. The only representations and acts relied upon were those of Reed and Llewellyn, which were mere opinions or recommendations, and the alleged ratification thereof by the "Director of the United States Geological Survey, to whom the

Secretary of the Interior referred said matter, and by the chief engineer and assistant chief engineer of the Reclamation Service under the direction of said department." (R., 18.) Such ratification was, however, found by the court to be only of the "acts of said Wendell M. Reed, district engineer, in *respect* to the *possession* of said engine and appurtenances." (R., 18.) Reed's only acts were the taking possession of the engine and using same under claim of right. Neither he nor Llewellyn ever did more than say that the Government had a right to the use of the engine, and that he, Reed, would "exert all the power of the Government to retain it" (R., 35), and that "he (Llewellyn) and Mr. Reed both said that they *thought* our claim was just and would like to see us get our money" (R., 39), and that he, Llewellyn, would "recommend" (R., 19) that the Government pay for same. The only acts of ratification shown were opinions in letters from the Department of the Interior concurring in Mr. Reed's view of the law, which was as follows:

> I took the position that being the agent of the United States my actions would be wholly controlled by the terms of the contract between the United States and the Taylor-Moore Construction Company. (R., 61-62.)
>
> I believe that the Government had a perfect right under the contract to retain and use this engine as well as all other equipment formerly in possession of the construction company for the completion of the work embraced in its contract. (R., 63.)

The evidence showing adoption of such opinion is found on pages 47, 50, and 55 of the record. It will be borne in mind, also, that the court found that the said officers of the Government only "ratified and adopted the acts of said Wendell M. Reed, district engineer, in respect to the possession of said engine and appurtenances." (R., 18.)

Furthermore, plaintiff was not deceived or misled by any of the Government officers, being always informed of their contentions and acting under advice of counsel, but preferred to leave the engine with the Government officers, hoping that some adjustment of the matter might be made, not, however, relying upon any promise, but only "in expectation" (R., 19) of inducing the Department to pay for it. It is evident, therefore, that Reed and Llewellyn did nothing which could be construed to be an implied promise to pay for the engine or its use; that they neither had nor claimed authority to make such contract, always referring plaintiff to some higher authority, and therefore could not impliedly do so, and that there was no ratification by anyone in authority of any acts from which a contract to pay for the use of the engine might be implied.

III.

It was not Shown that there was Any Fund Out of Which Judgment Might be Legally Paid.

Congress provided that moneys for reclamation work should be derived exclusively from a certain fund, and the Department of the Interior was only

authorized to make contracts for such work when said fund was sufficient to pay therefor. (Act approved June 17, 1902; 32 Stat. L., c. 1093, pp. 388 and 389; act approved Mar. 3, 1905; 33 Stat. L., c. 1459, p. 1032.)

No officer of the Government, however high in rank, had authority to make a valid contract to pay plaintiff's claim unless the special fund provided by Congress therefor was sufficient to cover same. (*Hooe* v. *United States*, 218 U. S., 322.)

It was an essential part of plaintiff's case to show that the said special fund was sufficient to pay its claim, and having adduced no evidence upon this subject, plaintiff failed to establish a material part of its case, and therefore can not recover in this action.

IV.

The Engine Having Been Taken Under a Claim of Right, and not in Recognition of a Paramount Title in Plaintiff, no Action Upon an Implied Contract Will Lie.

The said engine was held and used by officers of the United States under color of right by virtue of their contract with the construction company. They never admitted or recognized a paramount title or right to possession in plaintiff. Whenever the subject arose, they always contended that the United States had superior right to the use of the engine.

Whether this claim was or was not well founded in law is immaterial. It was persistently made and acted upon by said officers of the Government. This

being true, there was no exercise of the governmental, as distinguished from the proprietary, right of the Government.

As was well said by Judge Noyes, in his dissenting opinion written in this case:

> There is a clear distinction between a governmental and a proprietary right. When the United States in the exercise of their sovereign authority appropriate private property, the Constitution guarantees compensation and the law implies a promise to pay, upon which the owner, waiving formal condemnation proceedings, may sue. But when the Government uses property because it claims a title or interest in it, it asserts a proprietary right. If this be asserted wrongfully—if the officers of the Government take possession of property in which it has no interest—a tort is committed, but there can be no implication that the Government promises to pay for a thing which it claims to be entitled to without paying. (R., 89–90.)

Whenever the United States in the exercise of their sovereign power take property whose title is undisputed, the owner may waive the formality of condemnation or other proceedings and sue upon an implied contract to pay for the property, and this is the extent of the ruling in the cases relied upon by plaintiff (*Hill* v. *United States*, 149 U. S., 593, 599); but when the Government appropriates property, or its use, to which it claims title or the right to use same, there can be no implied

promise to pay therefor; and if such claim is unfounded in law, the taking is tortious, either with respect to the United States or their officers, and the injured owner can not waive the tort and sue upon an implied contract. His remedy lies not in an application to the courts, but to Congress.

> These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that Government, and in the belief that it was for its interest. In such cases where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims. (*Gibbons* v. *United States*, 8 Wall., 269, 275.)

> It is a very different matter where the Government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the Government, or the officers who seize such property, are guilty of a tort, if it be in fact private property. No implied contract to pay can arise any more than in the case of such a transaction between individuals. It is conceded that no contract for use and occupation would, in that case, be implied. (*Langford* v. *United States*, 101 U. S., p. 341, 344.)

Hill v. *United States*, 149 U. S., 593.

The case at bar falls clearly within the doctrine of the decisions quoted, and therefore there can be no recovery in this case, and same should have been dismissed by the trial court for want of jurisdiction.

Respectfully,

E. MARVIN UNDERWOOD,
Assistant Attorney General.

MARCH, 1914.

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Supreme Court

of the United States

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
(Defendant below),
against
BUFFALO PITTS COMPANY,
Defendant in Error,
(Plaintiff below).

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BRIEF FOR DEFENDANT IN ERROR

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Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
(Defendant below),
against
BUFFALO PITTS COMPANY,
Defendant in Error,
(Plaintiff below).

Brief For Defendant In Error.

This case comes to this court upon a writ of error to the Circuit Court of Appeals for the Second Circuit procured by the defendant United States of America to review a judgment dated February 8, 1912, modifying and affirming a judgment of the Circuit Court for the Western District of New York in favor of the plaintiff Buffalo Pitts Company for $1,558.65, entered on the 28th day of February, 1911.

The action was brought under the Tucker Act, (Act March 3, 1887, C. 359, 24 Stat. 505) by which the Court of Claims was given jurisdiction of all claims founded "upon any contract, express or "implied, with the Government of the United "States, or for damages, liquidated or unliqui- "dated, in cases not sounding in tort, in respect of "which claims the party would be entitled to re-

"dress against the United States either in a "court of law, equity or admiralty if the United "States were suable," (section 1). The Circuit Court was given concurrent jurisdiction "where "the amount of such claim exceeds one thousand "dollars and does not exceed ten thousand dol- "lars," (section 2).

This action is brought upon a contract with the Government of the United States implied by law from the following facts:

STATEMENT OF FACTS.

Prior to the 20th day of May, 1905, the Buffalo Pitts Company manufactured at Buffalo, N. Y., a 22 horse-power special traction engine with the usual appurtenances and equipment, which on that day it delivered to the Taylor-Moore Construction Company at or near the town of Roswell, in the County of Chaves, and Territory of New Mexico, under an agreement of sale and at the same time the Taylor-Moore Construction Company executed and delivered to the Buffalo Pitts Company a chattel mortgage of the property for $1600, (Plaintiff's Exhibit 1, p. 28) which was duly filed for record by the Recorder of said Chaves county, May 22, 1905, at 9:30 A. M. (Fol. 127).

The Construction Company in and by said chattel mortgage did "grant, bargain, sell and "mortgage unto the said mortgagee, its suc- "cessors and assigns, all that certain personal "property, etc., to have and to hold all and sin- "gular the personal property aforesaid, forever,

"as security for the payment of the notes and "obligation hereinafter described." etc., (Fols. 112-114), the said notes bearing even date with the mortgage and maturing monthly thereafter, the first one falling due June 20, 1905, (Fol. 115).

The mortgage contained these further conditions (italics by the present writer):

"But if default shall be made in the payment "of said sum of money or the interest thereon, at "the time the said notes shall become due, or *if "any attempt shall be made to dispose of* or in- "jure said property or to remove said property "from said County of Chaves, or any part there- "of, *by said Mortgagor or any other person,* or "if said Mortgagor does not take proper care of "said property, or *if said Mortgagee shall at any "time deem itself unsafe or insecure,* then the "whole amount of said money in said notes men- "tioned which shall not have been paid, shall be "*considered immediately due and payable,* and "the said party of the second part, its successors "or assigns, shall have the right and be entitled "to declare all of said notes due and payable, "anything in said notes to the contrary notwith- "standing, and then, thereupon and thereafter, it "shall be lawful, and the said Mortgagor hereby "authorize said Mortgagee, its successors or as- "signs, or its or their authorized agent, *to take "said property and enter on the premises where- "ever the same be found, to take and remove the "same, and hold or sell and dispose of the same* "and all equity of redemption at public auction, "with notice as provided by law," etc., (Fols. 117-120).

The Taylor-Moore Construction Co. had a contract with the Government to build the Hondo Dam in connection with the irrigation work known as the Hondo Project, and the engine was to be used in this work. In scarcely more than a fortnight after the engine was purchased, and on or about June 5, 1905, the Government suspended the operations of the Construction Company upon said work and took possession of said engine and its appurtenances, (Fols. 131-132). On June 7, 1905, the Construction Company assigned to the United States all its interest in its contract (Fol. 207).

About this time the Pitts Company was informed that the Construction Company had failed financially, and thereupon instructed George Hockenhull, of Gainesville, Texas, a travelling salesman and collector, to go to Roswell, New Mexico, to see what could be done about collecting its claim. He arrived at Roswell, June 15, 1905. The next day he called at the office of W. M. Reed, District Engineer, who had charge of the Government work there, and had a talk with him, (Fols. 134-135).

They discussed the chattel mortgage, of which Hockenhull had a copy with him, and the Government contract, of which Reed had a copy. "I "said to him that I had been sent out there to "take possession of the engine if I could not get "pay for it. I said to him, 'Mr. Reed, what would "you do if I should take legal proceedings to get "possession of the engine?' Mr. Reed said, 'I "would be bound to exert all the power of the "Government to retain it.' I said I had made up

"my mind it was foolish for us to commence a "litigation at that time at least. He said that it "would only be a few days until the Government "would do something about it, either surrender "the engine or pay our claim. And never ques- "tioned the right that we had to our pay, of de- "ferred payment. At that time he said this, that "he thought it would only be a few days until "they would do something about it; that they "had no idea of giving it up. He made no positive "promise but he thought it would only be a few "days until the Government would instruct him "to settle with us and retain the engine. They "seemed to think it was necessary on the works "and did not care to give it up," (Fols. 137-140).

Mr. Hockenhull made a report to the Pitts Company of his journey to Roswell and the result of his interview, (Fol. 141).

Thereupon Mr. John B. Olmsted, the secretary and attorney of the Pitts Company, wrote a letter to the Secretary of the Interior, dated June 30, 1905, reciting the facts and saying:

"We desire to state our position to you in "order to have it properly understood. We un- "derstand that the engine above referred to is "necessary to the work, and if the work is con- "tinued by the Government, will probably be "used by it in the future. Under the terms of "our mortgage, we suppose that we are entitled "to the possession of our property, but we have "of course no objections to leaving it on the "work, provided reasonable assurance of ulti- "mate settlement for it can be given.

"Will you kindly advise us what, if anything, "more is necessary for us to do in the premises, "and indicate, if possible, the action of the Gov- "ernment in connection with our claim above "set forth. We have a certified copy of our chat- "tel mortgage, and can submit it if it is neces- "sary," (Fols. 179-181).

This letter was referred by the Secretary of the Interior to the Acting Director of the U. S. Geological Survey, whose reply, dated August 2, 1905, was read in evidence, (Fols. 182-187). In this it was claimed that the United States was entitled to the possession of the engine "under "the terms of the contract," and reference was made to the Act of Congress approved February 24, 1905, (33 Stat. 811), which related only to "labor and materials." (See decision of this court, U. S. v. Conkling, 135 Fed. Rep. 508, 68 C. C. A. 220).

The Pitts Company replied August 22, 1905, showing that the statute did not apply to the case, and saying:

"We trust you understand our position in the "matter, which is that we do not care to allow "the engine to continue to be used and to take "our chances of the small percentage that is "likely to be paid to the creditors of the Taylor- "Moore Construction Co. May we ask that you "will advise us what we may expect?" (Fols. 192-193).

The Government replied August 30, 1905, "that "the matter has been referred to the Engineer in

"the field for a statement, on receipt of which "you will be further advised." (Fol. 197).

After the receipt of this letter Hockenhull was again sent to Roswell. He arrived there September 20 or 21, 1905, and remained until October, 1905, (Fols. 142, 160). He testified as follows:

"On this second trip I saw Wendell M. Reed, "the District Engineer. I saw him nearly every "day. I was up in his office. I saw him several "times. We talked the matter over every time "I would meet him. Mr. Reed could do nothing. "He said the matter was in just the same shape "as when I had been there before in June. He "still thought the Government would pay for the "engine. I finally decided to go back to Dallas "or take some legal steps to do something about "it and I consulted with some attorneys there. "They told me the same thing that Mr. Reed had. "They said that if we undertook to take the en- "gine we would have to give a bond for twice "the amount of our claim and the Government "would turn around and take it away from us "again and go ahead. We would not be in any "better condition at all than we were at the pres- "ent time. Mr. Reid told me this and the attor- "neys I consulted confirmed it. It was Richard- "son, Reed and Harvey, I think the name of the "law firm. They said the same thing, that that "would be the condition we would get into if we "tried to take the engine away from the Govern- "ment. I talked with Mr. Reed about how we "were going to get our pay eventually; that was "what I was after; trying to get the thing set- "tled, trying to get the money for the Buffalo "Pitts people. We did not care for the engine;

"we didn't want the engine really, but we, of "course, as a last resort, consented to take it "under the terms of the mortgage. The lawyers "advised me that I was taking exactly the right "course in doing what I did, not to try to pile "up more expense because it would be useless. "That was their decision, and just make a lot of "expense and be still in the same position that "we were. The Government at that time was "prosecuting the work on the Hondo Project. "The engine was being used on the work," (Fols. 143-147).

Hockenhull was about to leave Roswell, when Reed asked him to wait a few days for the arrival of W. H. H. Llewellyn, United States District Attorney for the Territory of New Mexico, who was expected there in two or three days. Hockenhull waited and met the Government's attorney and enigneer at the latter's office, (Fols. 150-151).

"I asked Mr. Llewellyn what he thought would "be the outcome of the thing; whether he thought "there was any prospect of the Government to "pay for the engine or not, and he and Mr. Reed "both said that they thought our claim was just "and would like to see us get our money; and "then the Judge (Llewellyn) suggested that he "would write a letter to the Department that day "suggesting a settlement, and later on the same "day read me a copy of his letter.

"Plaintiff offered and read in evidence the fol-"lowing extract from the letter of W. H. H. Llew-

"ellyn to the Attorney General, dated Roswell, "New Mexico, September 30, 1905:

> " 'In this connection I desire to call your attention to the fact that the Buffalo Pitts Mfg. Co. furnished the Taylor-Moore Construction Co. with a traction engine of the value of $1,600, giving said Buffalo Pitts Mfg. Co. a chattel mortgage on same. The reclamation engineers are using this engine. The Buffalo Pitts Company desire either to have the engine or make some arrangement whereby they may be paid for this sale, and *the question is in the event of their attempting to replevy same and take it from the possession of the engineers, whether I should resist it or not. I take it that there could be a redelivery to the engineers and under Section 1001 R. S. would not be required to give a bond, and could probably keep possession of the engine for some time and thus enable the engineers to complete the reservoir in question. But would not this subject the Government to a suit which would result eventually in the Government having to pay for the engine. I will thank you to advise me what in your opinion would be the correct position for me to take on the question'.*" (Fols. 153-158). . .

Hockenhull reported these interviews to the Pitts Company. He waited at Roswell several days for a reply from the Government, but never got any and left, (Fols. 160-161).

While he was there, the Pitts Company received another letter from the Chief Engineer of the

Reclamation Service under the Department of the Interior, dated September 26, 1905, claiming possession of the engine under the terms of the contract with the Construction Company, and alleging "that the engine was furnished and was in "use upon the work before any instrument was "filed showing title in any one other than the "contractors," (Fol. 201). This allegation was consistent with the fact that the engine was sold on or before May 20, 1905, the date of acknowledgment of the chattel mortgage (Fol. 126), and that the instrument was filed May 22, 1905, at 9:30 A. M., (Fol. 127), and was not inconsistent with the right, title and interest of the Pitts Company under the mortgage.

This letter further said: "The status of the "machinery in question is the same as that of "other machinery, tools, stock, etc., belonging to "the contractors and taken over by the govern- "ment in pursuance of the express terms of the "contract, and *until the work is completed and "matters under the contract are finally adjusted*, "no change in the status of the machinery can "be made nor claims thereto recognized," (Fols. 203-204).

It will be noted that the Government only claimed to hold the engine "until the work is "completed and matters under the contract are "finally adjusted," and it was a claim to "the "machinery" and not to just compensation therefor which the Government refused to recognize. The fair inference was that when the work was completed the matters under the contract would be finally adjusted, including the Pitts Company's

claim. The reports subsequently received from Hockenhull confirmed this expectation.

The foregoing correspondence proves that the retention and use of the engine by the Government was authorized by the Department of the Interior, which was fully empowered by the Reclamation Act, hereinafter cited, to take any property it needed. Under this authority the engine was retained and used by the Government until June 21, 1906, when the work was finished, (Fol. 208).

After that the engine appears to have been abandoned. It was found by the Pitts Company standing out on the open ground near the Hondo Dam. It was badly eaten with rust and had been robbed of its parts until nothing much was left but the wheels and boiler. In 1906, what was left of it, was not worth more than $350, (Fols. 218-219, 227-228).

The purchase price of the engine was $1820. That was the price at Houston, Texas, and the freight was to be added to that, to put it in New Mexico, (Fol. 212). The Pitts Company received a down payment of $145, and $75 was allowed to the Construction Company for freight charges (from Buffalo to Houston), (Fol. 214). No part of the balance of $1600 secured by the chattel mortgage was ever paid, (Fol. 210).

An arrangement was made at Washington in April, 1907, between Mr. Olmsted, representing the Pitts Company, and Mr. Morris Bien of the Reclamation Service, representing the Depart-

ment of the Interior, to determine the fair value of the use of the engine, if the Government should pay for it at all, (Fol. 212). The value of the engine when it was put on the work less its appraised value when the Government got through with it was to be taken as reasonably approximate compensation, if any. An appraisal was made accordingly (Fols. 213-214), and the value of the engine at the time of appraisal was fixed at $500, (Fol. 222).

The Government refused to pay any part of the claim and this action was brought. Other facts are found in the decision of the Court (Findings, Fols. 56-57).

POINT I.

THE BUFFALO PITTS COMPANY WAS THE LAWFUL OWNER OF THE ENGINE AND BECAME ENTITLED TO POSSESSION OF IT AS SOON AS THE MORTGAGOR ATTEMPTED TO DISPOSE OF IT TO THE GOVERNMENT, UNLESS THE GOVERNMENT EXERCISED THE RIGHT OF EMINENT DOMAIN.

As the manufacturer and vendor of the engine, the Pitts Company was the general and absolute owner of the property, with the legal title and right to immediate possession, excepting only as the latter was modified by the transaction of sale and mortgage. The legal title was not altered by this transaction, for simultaneously with the implied transfer of the title to the mortgagor it was expressly reconveyed to the mortgagee by

the words "grant, bargain, sell and mortgage "unto the said mortgagee, its successors and as- "signs" (Fol. 112).

A mortgage of chattel conveys the legal title to the mortgagee, and is not merely a security as in the case of real estate.

Jones, on Chattel Mortgages, section 1, states the matter as follows:

"A formal mortgage of personal property is a "conditional sale of it as security for the pay- "ment of a debt or the performance of some other "obligation. The condition is that the sale shall "be void upon the performance of the condition "named. If the condition be not performed ac- "cording to its terms, the thing mortgaged is ir- "redeemable at law, though there may be a re- "demption in equity, or by force of statute.

"Such a mortgage is something more than a "mere security. It is a conditional sale of chat- "tels, and *operates to transfer the legal title to "the mortgagee,* to be defeated only by a full per- "formance of the condition. Upon breach of the "condition the mortgagee may take possession of "the property, and, so far as the legal rights of "the parties are concerned, he may thenceforth "treat it as his own; he may sell it or give it "away; squander it or destroy it.

"In this respect a mortgage of personal prop- "erty is like a mortgage of real estate under the "old common law, but differs widely from a mort- "gage of real estate, as the latter has gradually "come to be viewed within the past half century

"in nearly half the states and territories of the "United States; for while in these states such a "mortgage is regarded as conferring no legal "title upon the mortgagee, but as being a mere "lien or security, in these same states almost "without exception, and everywhere else, a mort- "gage of personal property is regarded as not "being a mere security, but as passing the legal "title, which becomes absolute in the mortgagee "upon default."

In Conrad v. Atlantic Insurance Co., 26 U. S. 386, (7 Lawyers Ed. 189), the Supreme Court in a very important case argued by the most eminent counsel, in which Mr. Justice Story wrote the opinion, upheld the principles upon which the defendant in error here relies. In that case the Atlantic Insurance Company claimed title under a mortgage of personal property and the United States claimed priority under executions in its favor levied upon the property by Conard, as United States marshal. The mortgage was held to be a conveyance that divested the priority. The Court said at page 441:

"It is true, that in discussions in Courts of "Equity, a mortgage is sometimes called a lien "for a debt. And so it certainly is, and something "more; it is a transfer of the property itself, as "security for the debt. This must be admitted "to be true at law, and it is equally true in equity. "for in this respect equity follows the law. It "does not consider the estate of the mortgagee as "defeated and reduced to a mere lien, but it "treats it as a trust estate, and according to the "intention of the parties, as a qualified estate and

"security. When the debt is discharged there is "a resulting trust for the mortgagor. It is there- "fore only in a loose and general sense that it is "sometimes called a lien, and then only by way "of contrast to an estate absolute and indefeas- "ible."

The New York Court of Appeals stated the common law of chattel mortgages as follows:

"The execution of a chattel mortgage, in the "usual form, invests the title in the mortgagee, "subject to be defeated by subsequent perform- "ance of the condition.

"The right of possession ordinarily follows "that of property; and both would pass under "such an instrument, in the absence of any ex- "press or implied agreement for the retention of "the chattels by the mortgagor.

"But when the instrument specifically defines "the circumstances under which the right of pos- "session is to vest in the mortgagee, the law im- "plies an intent that it is to remain meantime in "the mortgagor."

Hall v. Sampson, 35 N. Y. 274.

"As a general rule, the right of possession fol- "lows the right of property; and, therefore, "where there is no restraining stipulation, the "mortgagee having the right of property, until "defeated by the performance of the condition, "has as incident thereto the right of possession, "and may therefore take the goods into his own "custody, or maintain trespass or trover for

"them, against any one who takes or converts "them to his own use."

Coles v. Clark, 3 Cush. 399, 402, per Chief Justice Shaw.

The Government offered in evidence Chapter 1, Title 27, of the Laws of New Mexico, (Fol. 252) but it omitted the most important sections.

Chapter 1, Title 27, of the Laws of New Mexico, section 2370, provides as follows:

"Any person having conveyed to another any "personal property by chattel mortgage or other "instrument of writing having the effect of a "mortgage or lien upon such property, who dur- "ing the existence of such mortgage or lien shall "sell, transfer, conceal, take, drive or carry away, "*or in any manner dispose of such property or* "*any part thereof, or cause or suffer the same to* "*be done, without the written consent of the* "*holder of such mortgage or lien, shall be guilty* "*of a misdemeanor*, and on conviction may be "fined in a sum not exceeding twice the value of "the property so sold or disposed of, or confined "in the county jail not exceeding six months, or "both, at the discretion of the Court."

The Supreme Court of New Mexico has construed this section in connection with section 2365 and the other sections cited by the Government (Fol. 252), in Kitchen v. Shuster, 14 N. M. 164, 89 Pac. Rep. 261, decided in 1907. This was a replevin action to recover possession of 103 head of steers. One George E. Staring with the plaintiff Kitchen as accommodation maker, executed and

delivered to one Morris a promissory note for $1700 with interest. To indemnify himself Kitchen took from Staring a bill of sale covering the cattle in question conditioned to be null and void upon payment of the note, otherwise to remain in full force. Staring retained possession of the steers and a month later made an absolute sale to the defendant Shuster for a consideration of $1775. Shuster took possession, and Kitchen brought replevin. The plaintiff had a verdict and the Supreme Court held the law in his favor as stated in the following syllabus, but reversed the judgment on a question of evidence as to whether defendant had notice of the plaintiff's mortgage, which was not recorded until after the sale to the defendant.

The syllabus of the Court, so far as relevant here, was as follows:

1. At common law the mortgagee in a chattel mortgage is entitled to the possession of the property mortgaged, but this has been changed in this territory by C. L. 2365, which *in the absence of any agreement to the contrary* gives the right of possession to the mortgagor until divested thereof *by operation of law or by breach of the terms of the mortgage.*

2. By C. L. Sec. 2370 the mortgagor is penally prohibited from selling the chattels mortgaged without the written consent of the mortgagee and *this statutory provision is to be read into the mortgage as a condition thereof to the same extent as if embodied therein in so many words.*

3. A breach of this statutory condition gives the mortgagee the right to sell the property under Sec. 2367, which provides that upon condition broken the mortgagee may proceed to sell the mortgaged property to satisfy the mortgage.

4. *The right to sell includes the right to possess and thus the right to maintain replevin to recover the possession.*

The same Court in First National Bank of Roswell v. Stewart, 13 N. M. 551, held that a chattel mortgagee could sustain replevin against an execution levied upon the mortgaged goods while still in possession of the mortgagor. From this decision it necessarily follows that the Pitts Company had the right of possession to the engine as claimed by it, unless the Government had the superior right of eminent domain, as hereinafter stated.

The conditions contained in the Pitts Company's mortgage are substantially the same as those stated in the statute, section 2370, above.

The attempt of the Construction Company to dispose of the mortgaged engine to the United States was a fatal breach of the conditions upon which its right to possession depended and a direct violation of the penal law.

"The Taylor-Moore Construction Co. assigned "to the United States their interest in their con- "tract on the Hondo Project, on June 7, 1905, and "the United States on that date took charge of all "material, supplies and equipment belonging to

"them," (Fols. 207-208) including the mortgaged engine and appurtenances, (Fols. 132-133). On or about June 5, 1905, the United States had suspended the operations of the Construction Company (Fol. 245), which forfeited its contract, (Fol. 241). The company failed financially and left Roswell, (Fols. 135, 161).

This was exactly such a situation as the chattel mortgage and statute were intended to provide against. The statute forbade the mortgagor to dispose of the property in any manner, "or to "cause or suffer the same to be done." The Government had notice of this provision and was bound by it as well as the Construction Company. The provision was self-executing. As soon as the attempted disposition was made the right of possession on the part of the Construction Company ceased and passed to the Pitts Company.

This construction is not only fair and reasonable but necessary, for otherwise legitimate business would be deprived of protection. The Pitts Company could not afford to ship a new engine to a distant point upon a small cash payment, unless it had the right to immediate possession under the circumstances stated. If the Government thereafter exercised the right of eminent domain under its contract and section 7 of the Reclamation Act, hereinafter cited, it was obliged to make just compensation. The United States is therefore answerable to the Pitts Company for the use and possession of the engine which it enjoyed. The Pitts Company as soon as possible, on June 16, 1905, fully and actually notified the Government of its rights, of which the engineer

in charge seems to have had previous knowledge, (Fols. 135-136).

Kitchen v. Shuster, above, holds that the demand of possession which was made, was unnecessary.

POINT II.

THE UNITED STATES IS BOUND TO PAY THE BUFFALO PITTS COMPANY FOR DEVOTING ITS PROPERTY TO PUBLIC USE.

This follows from the admissions contained in the Government's answer:

"1. Admits that the Buffalo Pitts Company, "the plaintiff herein, is organized and has its "place of business as in said petition set forth; "that the Taylor-Moore Construction Company "had a certain contract with the United States of "America, the defendant herein, through its De- "partment of Interior, for certain reclamation "work in the Territory of New Mexico; that on or "about June 7th, 1905, *the United States of Amer- "ica* suspended the Taylor-Moore Construction "Company from work on and under such contract "and *took possession of* all supplies, materials "and equipments of said Company then on said "work, including *the so-called Buffalo Pitts' en- "gine* mentioned in said petition, pursuant to the "provisions of the contract aforesaid and there- "upon and thereafter completed the work there- "under, by and with the use, aid and assistance of "the said supplies, materials and equipments, in- "cluding the said engine." The remainder of the answer is merely a denial of knowledge or infor-

mation sufficient to form a belief as to the facts not admitted, (Fols. 46-48.)

The contract under which this justification is alleged is not in evidence. The most definite evidence of its contents is that contained in two letters from the Department of the Interior. One said:

"Under the terms of said contract, in case of "default by the contractor the United States is "entitled to the possession of the *contractor's* "*machinery* delivered on the ground and if the "engine referred to was delivered, the United "States has taken possession of it under the "terms of the said contract," (Fol. 186).

The other said:

"Upon default of the contractors, the Govern- "ment under the terms of the contract which was "in force at the time the chattel mortgage is said "to have been filed, took possession of all the "machinery, tools and appliances *belonging to* "*the contractor,* upon the ground," (Fol. 202).

It appears, therefore, that the Government asserted in its contract a right in case of the contractor's default, to take over any machinery delivered to him upon the ground, regardless of title, and to use it until the completion of the work.

That was an assertion of the right of eminent domain as to any property which the contractor was not entitled to hold against the true owner. It appears to have been a lawful exercise of that power, and the Government engineer in the field

appears to have been correct in saying: "I be-
"lieve that the Government had a perfect right
"under the contract to retain and use this engine
"as well as all other equipment formerly in pos-
"session of the Construction Company for the
"completion of the work embraced in its con-
"tract," (Fol. 251).

This right was, however, subject to the limitation imposed by the Fifth Amendment of the Constitution: "Nor shall private property be "taken for public use without just compensa-"tion."

The Reclamation Act of June 17, 1902, 32 Stat. 388, 4 Comp. Stat. 666, under which the contract was let provides in section 7, "that where in carry-"ing out the provisions of this act it becomes nec-"essary to acquire *any rights* or property, the "Secretary of the Interior is hereby authorized "to acquire the same for the United States by "purchase or by condemnation under judicial "process, and to pay from the reclamation fund "the sums which may be needed for that pur-"pose."

The exact wording of the contract is immaterial. The acts of the Government are clearly proved and these determine its responsibility, regardless of the contract. The statute conferred the right of eminent domain, and the Government exercised it directly and immediately by taking and holding the plaintiff's property. No statute of the United States or of the Territory of New Mexico providing any method of procedure for condemning personal property can be found. The

case falls within the general grant of jurisdiction made to the Federal Courts by the Judiciary Act of 1789.

Kohl v. U. S., 91 U. S. 367, 23 L. ed. 449.

See Lewis on Eminent Domain, §§413, 513-514, and cases cited.

The right of the Government to take the engine in question for use until the work was completed, is evidently included in the right to appropriate the property absolutely. The only person who could object thereto was the plaintiff, which has not raised such an objection. After the Government was through with the engine, the plaintiff took possession of it and agreed with officers of the Government as to the proper measure of damages, in case it was entitled to damages, (Fols. 212-223).

Both in law and equity the right, title and interest of the plaintiff in and to the engine was prior and superior to any claim on the part of the Government, except the right of eminent domain. The Government took the engine *cum onere,* subject to the chattel mortgage previously and duly filed.

"The supposition that the Government will not "do justice is not to be indulged."

Gibbons v. U. S., 8 Wall. 269, 19 L. ed. 453.

Its action was the exercise of a governmental right. Only a sovereign power would assume such a right as was asserted by the United States

in this case. In order to complete a public work it commandeered all the machinery found upon the ground in the contractor's possession, upon his default. It did not claim that the contractor's machinery thereby became its property, and it did not claim title to the engine in question. It simply claimed the right to take and use it. The right of the plaintiff to payment was not disputed, (Fols. 138-139, 149, 153-158). The view of this matter taken by the majority of the Circuit Court of Appeals was clearly correct, and the dissenting opinion concedes that if this is the fact, there is no reason for dissent, (page 90). The learned judge assumes that the Government's employees claimed a proprietary right in the engine. In this he goes beyond the evidence. They claimed that the engine came under the contract and therefore that they could hold and use it, but whether this was a governmental or proprietary right, the employees did not attempt to say or to inquire. A governmental right was lawful because it allowed just compensation to be made. A proprietary right did not exist and was without any foundation in fact.

"Very different from this proprietary right of "the Government in respect to property which it "owns is its governmental right to appropriate the "property of individuals. All private property "is held subject to the necessities of government. "The right of eminent domain underlies all such "rights of property. The Government may take "*personal or real property* whenever its neces- "sities, or the exigencies of the occasion, de- "mand. So, the contention that the Government "had a paramount right to appropriate this

"property may be conceded, but the Constitution "in the 5th Amendment guarantees that when this "governmental right of appropriation—this as- "serted paramount right—is exercised it shall "be attended by compensation."

U. S. v. Lynch, 188 U. S. 445, 465, 47 L. ed. 546.

POINT III.

THE LAW IMPLIES A CONTRACT THAT THE UNITED STATES WILL PAY THE BUFFALO PITTS COMPANY JUST COMPENSATION.

"In such case, the party makes no promise on "the subject; but the law 'consulting the inter- "'ests of morality' implies one; and the liability "thus arising is said to be a liability upon an im- "plied contract."

Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 45, Book 17 Lawyers Ed. p. 805, 807.

"Implied contracts are such as reason and "justice dictate, and which, therefore, the law pre- "sumes that every man undertakes to perform."

1 Parsons, Contr. p. 5.

"Contracts implied in law are legal fictions "adopted for the purpose of enforcing legal "duties by actions *ex contractu*, where no actual "contract exists, either express or implied. In "the case of a contract implied in law, the inten- "tion is disregarded."

15 Am. & Eng. Enc. Law, p. 1078.

There is an implied contract on the part of the Government to pay compensation where it takes private property.

Pumpelly v. Green Bay & M. Canal Co., 13 Wall. 166, 20 L. ed. 557, 560.

U. S. v. Jones, 109 U. S. 513, 27 L. ed. 1015.

U. S. v. Great Falls Mfg. Co., 112 U. S. 645, 28 L. ed. 846.

Hollister v. Benedict & B. Mfg. Co., 113 U. S. 59, 28 L. ed. 901.

U. S. v. Palmer, 128 U. S. 262, 32 L. ed. 442.

U. S. v. Berdan Fire Arms Mfg., Co., 15 U. S. 552, 39 L. ed. 530.

Dooley v. U. S., 182 U. S. 222, 45 L. ed. 1074.

U. S. v. Lynch, 188 U. S. 445, 47 L. ed. 539.

U. S. Cornell Steamboat Co., 202 U. S. 184, 50 L. ed. 987.

The first three of the cases cited relate to the taking of real estate, the second three to the use of patented inventions, and the last three respectively to custom duties illegally exacted, the destruction of a rice plantation, and salvage of dutiable goods.

The present case is clearly within the principles established in the cases cited.

U. S. v. Palmer, 13 Wall. 623, 20 L. ed. 474, was a case, in which three steamboats were impressed into the public service on the ground of military necessity, and after being used for various

periods were returned to the owner. Certain payments for the services were made to him, but he claimed a larger sum. He recovered a judgment upon an implied contract which the Supreme Court affirmed. In its general features the case is analogous to the present case.

The cases cited in the Government's brief to show that to constitute an implied contract in this case there must have been a meeting of the minds of the parties, are not in point. Hill v. United States, 149 U. S. 598, was an action to recover damages against the Government for the use and occupation of land for a light-house. The land in question was under the tidewaters of Chesapeake bay, and the United States claimed a paramount right to the use thereof for a light-house without making any compensation therefor. This court dismissed the suit for want of jurisdiction, on the ground that it did not come within the provisions of the Tucker Act. In this case the title of the plaintiff to the land in question was disputed, and the rule in Langford v. U. S., 101 U. S. 341, was applied. The other case cited by the Government, Harley v. U. S., 198 U. S. 229, was an action by a Government employee which sought compensation for the use by the United States of a patented device, brought after fourteen years' delay in presenting the claim. As expressed in the findings of fact, "it was sup-"posed and understood by the Secretary and "Chief of the Bureau that the claimant being an "employee of the Treasury Department, would "neither expect nor demand compensation." The principles applicable to such an action do not apply to the present action.

The Government also cites Langford v. U. S., 101 U. S. 341, but as pointed out above the claimant's title in that case was disputed, and if the claimant's allegations were true, the Government was guilty of a tort. Gibbons v. U. S., 8 Wall, 275, involved the tortious conduct of a Government quartermaster. Knapp v. U. S., 46 C. of C. 601, was an action by officers of the U. S. navy assigned to duty in the Bureau of Ordinance to recover compensation for a patented device invented by them while engaged in such duty. Held, that a presumption of implied contract did not arise. All such cases are foreign to the present argument.

The Government also cites, Hooe v. United States, 218 U. S. 322, 31 Supreme Court Reporter 85. The owners of a building in Washington occupied by the Civil Service Commission under a lease made by the Secretary of the Interior had received the entire sums which Congress had appropriated from year to year as full compensation for the rent of said quarters. Without the owners' consent the Commission used the basement which was not included in the lease. The owners made a claim under the Tucker Act for the difference between the rents received and the fair rental value of the building including the basement. The Revised Statutes prohibited any department from expending any sum in excess of its appropriations, and a special statute prohibited contracts for the rental of property for government purposes "until an appropriation "therefor shall have been made in terms by Con-"gress," and a further statute was enacted "that

"this clause be regarded as notice to all contrac-
"tors or lessors of any such building or any part
"of building." The Secretary of the Interior had never recognized the owners' claim and they had continued to receipt for the rent in full. *Held* no cause of action. The decision is not in point upon this argument.

The Government's third point that "it was not "shown there was any fund out of which judg-"ment might be legally paid" is without force. So far as appears, the reclamation fund is ample to pay this judgment, and the Government may charge it to that fund, if it pleases. The presumption is that the fund is sufficient for the purpose. Under the Reclamation Act, section 4, the Secretary of the Interior could only let the contract which the Government's answer admits, (Fol. 46) "providing the necessary funds for such "portions or sections are available in the reclama-"tion fund, and thereupon he shall give public "notice of the lands irrigable under such pro-"ject," etc. A public officer is presumed to have done his duty. The Secretary must have certified that the necessary funds to complete the work in question, including incidental expenses like the present claim, "are available in the re-"clamation fund." That is no doubt the fact. Howbeit, the United States is generally liable. It owned the lands upon which the improvement was made, and their value was enhanced by such improvement. Having had the benefit of the plaintiff's engine to enhance its own estate, it cannot retain such benefit without making its property generally liable.

POINT IV.

THE JUDGMENT SHOULD BE AFFIRMED WITH COSTS.

All of which is respectfully submitted.

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